No. 82-1665

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ILLINOIS TOOL WORKS, INC.,

Petitioner,

v.

GRIP-PAK, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

EARL E. POLLOCK
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000
Counsel of Record for Petitioner

SONNENSCHEIN CARLIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
Of Counsel

TABLE OF AUTHORITIES

Cases

Other Authorities

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Respondent's response to the petition only serves to confirm the propriety of review.

It is indisputable that the Court of Appeals' analysis of the *Noerr-Pennington* doctrine sets forth a rule of law to be followed in the Seventh Circuit—not only in this case but in all cases. Respondent's assertion that "the Seventh Circuit's ruling is merely advisory" (Br. 9) is frivolous. An alternative holding is nonetheless a holding[1]; and in any event the petition for certiorari in this case seeks review of *both* alternative holdings with respect to the "sham litigation" issue.

[1] "[W]here the decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Commonwealth of Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948); *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928).

It is also indisputable that the rule of law adopted by the Seventh Circuit is in direct conflict with the decisions of other Courts of Appeals (see Pet. 6-12). Respondent (Br. 11-19) denies the existence of a conflict on the extraordinary ground that it intends to rely on other arguments to circumvent the *Noerr-Pennington* doctrine. Those arguments, it should be noted, were made to—and implicitly rejected by—the Court below, which instead adopted its "subjective purpose" rationale. The clear conflict presented by that decision is in no way dispelled by the possibility that this particular plaintiff (apparently unwilling to rely on the rationale below) wishes to persist in advancing other arguments.

Respondent further errs in contending that, "... irrespective of how this Court acts on the two questions raised by the Petition, a trial against petitioner on the sham litigation exception to the Noerr-Pennington Doctrine and the 'overall scheme' theory ... is certain" (Br. 10).[2] On the contrary, if petitioner's *Noerr-Pennington* position is sustained in this Court, the prior state action—as the District Court held—cannot be characterized as "sham litigation" and

[2] Respondent's reliance on the allegations of its complaint (Br. 2-5, 10, 13) is misplaced since the *Noerr-Pennington* issue arises in this case on a motion for summary judgment, not a motion to dismiss. On a summary judgment motion, contrary to respondent's patently erroneous contention (Br. 5), the allegations of the complaint are *not* to be accepted as true. Instead, Rule 56(e), Fed. R. Civ. P., expressly provides that "... an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial" and that "[i]f he does not so respond, summary judgment, if appropriate, shall be entered against him".

therefore cannot provide the basis of an antitrust recovery.[3] Respondent's repeated insistence that "sham litigation" is unprotected by *Noerr-Pennington* (Br. 12-14) misses the point; the threshold question is whether the prior state suit constitutes such "sham litigation".

Because of the clear conflict and the other reasons stated in the petition, certiorari should be granted.

Respectfully submitted,

EARL E. POLLOCK
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000
Counsel of Record
for Petitioner

SONNENSCHEIN CARLIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
Of Counsel

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[3] As this Court held in the *Pennington* case itself, conduct protected by the *Noerr-Pennington* doctrine ". . . is not illegal, *either standing alone or as part of a broader scheme itself violative of the Sherman Act*", and no damages can be based on such conduct. *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670-71 (1965) (italics added). See also, e.g., *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 225, 228-29, 233 (7th Cir. 1975).

Respondent does not (and cannot) cite any authority to the contrary. Its string of citations (Br. 15-18) is inapposite to the questions presented. Indeed, the *Noerr-Pennington* doctrine was not even involved in *Kobe* (which was decided before *Noerr*), *Dairy Foods, Mach-Tronics, Rex Chainbelt,* and *Kearney & Trecker. Handgards* involved a prior suit knowingly brought *without* probable cause, and *Clipper Exxpress* (as pointed out at Pet. 11) expressly recognizes that an anti-competitive intent "is not determinative".